NO. 91-719

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

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AL C. PARKE, WARDEN, PETITIONER

versus

RICKEY HAROLD RALEY, RESPONDENT

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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# REPLY BRIEF FOR PETITIONER

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Comes the Attorney General of the Commonwealth of Kentucky as counsel for petitioner Al C. Parke, Warden, and states in reply to the Brief for Respondent as follows:

ARGUMENT I

THE ARGUMENT THAT BOYKIN DID NOT ESTABLISH A GROUND FOR COLLATERAL ATTACK UPON A CONVICTION SHOULD BE CONSIDERED BY THIS COURT.

The Respondent (Raley) contends that the Petitioner (Commonwealth) did not adequately present the argument that Boykin v. Alabama, 395 U.S. 238 (1969), did not establish a ground for collateral attack in the lower federal courts. (Brief for Respondent, pp. 7-9). The Commonwealth disagrees.

The issue whether Boykin itself provides a ground to invalidate a prior conviction on collateral review (including a sentence enhancement proceeding) is inherent in the question presented, i.e., which party bears the burden of proof regarding validity of such convictions. The application of Boykin to a

collateral attack is the threshold issue on the question regarding burden of proof. That issue is also inherent to Arguments II to VII advanced by Raley. (Brief for Respondent, pp. 9-30). The Federal District Court obviously agreed with the Commonwealth that mere failure to conduct a Boykin colloquy did not itself establish ground for collateral relief since that Court denied Raley's habeas petition without finding that Boykin was complied with. (AP 22-25; HR 8).

The Commonwealth's Memorandum of Law filed in the Federal District Court, which presented the Commonwealth's argument regarding the petition for habeas corpus, argued that Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1989), cert. denied, 110 S.Ct. 1539 (1990), was wrongly decided. (Memorandum of Law in support of respondent's answer [Memo], p. 11; HR 3). In the United States Court of Appeals for the Sixth Circuit, the Commonwealth requested an en banc hearing to argue that Dunn v. Simmons, supra, should be overruled and specifically argued that

"Dunn was wrongly decided". (Raley v. Parke, 945 F.2d 137 at 141 (6th Cir. 1991) (AP 11 and 13). The Commonwealth's three argument captions in its brief in the Sixth Circuit stated:

> I. The Sixth Circuit Opinion in Dunn v. Simmons is contrary to precedents of the United States Supreme Court and other circuits of the United States Court of Appeals and should be overruled.
>
> II. The Kentucky Trial Court and Federal District Court correctly concluded that Raley's 1981 guilty plea was voluntary.
>
> III. The United States District Court correctly rejected Raley's claimed errors.

(Brief for Respondent-Appellee, pp. 8, 19, and 29).

The cases cited by the Commonwealth in its brief in the Sixth Circuit do not establish that mere violation of Boykin is a ground for a collateral attack and note the distinction between direct review and collateral review. The Sixth Circuit's own opinions in similar cases did not conclude that Boykin error is automatic ground to invalidate a guilty plea on

collateral attack. See Riggins v. McMackin, 935 F.2d 790 at 795-796 (6th Cir. 1991) [collecting cases]; Pitts v. United States, 763 F.2d 197 at 200 (6th Cir. 1985) [cited in Sixth Brief at p. 25]; Roddy v. Black, 516 F.2d 1380 at 1383-1385 (6th Cir.), cert. denied, 423 U.S. 917 (1975) [cited in Sixth Circuit Brief at p. 24].

Since the Commonwealth did not claim in the Federal District Court that the colloquy required by Boykin v. Alabama was in fact conducted regarding the 1981 guilty plea, the Federal District Court obviously accepted the principle that the mere failure to conduct such a colloquy did not automatically require a conviction to be invalidated. Hence that aspect of this case was clearly before the Sixth Circuit for its consideration. The relevancy of that argument is also demonstrated by the Brief of the United States as amicus curiae (pp. 16-23) in this Court.

This Court has recently pointed out that the certiorari petitioner and respondent "are not

limited to the precise arguments they made [in the Court] below." Yee v. City of Escondido, 112 S.Ct. 1522 at 1532, 118 L.Ed.2d 153 at 169-170 (April 1, 1992). The Court has discretion in deciding the manner in which an argument must be preserved in a lower federal court for review by this Court. See United States v. Williams, 112 S.Ct. 1735 at 1738-1741, 118 L.Ed.2d 352 at 361-364 (May 4, 1992). As in the Williams case, the Commonwealth (certiorari petitioner) did not concede this matter in the lower federal courts. This argument does not "sandbag" the Sixth Circuit.

For the foregoing reasons, the Court should consider the argument as to whether Boykin permits a prior conviction offered for sentencing enhancement to be collaterally attacked.

## ARGUMENT II

### JACKSON V. DENNO, 378 U.S. 368 (1964), DOES NOT REQUIRE THAT PRIOR CONVICTIONS OFFERED FOR SENTENCING ENHANCEMENT BE REVIEWED BY HABEAS CORPUS PROCEEDINGS.

Raley has cited Jackson v. Denno, 378 U.S. 368 (1964) (Brief for Respondent, p. 16), for the principle that a federal habeas court may order a state court to conduct a hearing according to federal constitutional standards. The Court in Jackson held that the habeas petitioner was entitled to hearing by the trial court upon the voluntariness of his confession outside the presence of the jury and that the hearing and further proceedings "should occur initially in the state courts rather than in the federal habeas court." 378 U.S. at 391 and 393. In this case Raley did not testify or assert in his habeas petition that his guilty plea was coerced. (JA 82 and 84; HR #2; TE 20, JA 51; Raley v. Parke, 945 F.2d 137 at 139-140, AP 5-6 and 10) See Colorado v. Connelly, 479 U.S. 157 at 164-167 (1986), defining coercion

regarding confessions. Raley in fact received an evidentiary hearing in state court outside of the jury's presence, the type required by Jackson.

Subsequently, the Court has restricted Jackson. In McMann v. Richardson, 397 U.S. 759 at 773 (1970), the Court ruled that Jackson did establish grounds to automatically invalidate a guilty plea simply because a possibly inadmissible confession might have been introduced if a trial had been requested by the defendants. In Wainwright v. Sykes, 433 U.S. 72 at 86-87 (1977), the Court ruled the Jackson did not prevent a claim regarding the voluntariness of a confession from being defaulted in state court.

In Stone v. Powell, 428 U.S. 465 (1976), the Court held that Fourth Amendment claims could not be relitigated in federal habeas proceedings after a full and fair hearing in state court, even though previously in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Court had

reviewed the voluntariness of consent for a police search under the federal habeas corpus statute. See 428 U.S. at 481 and 491, n. 31. Also see Keeney v. Tamayo-Reyes, 112 S.Ct. 1715, 118 L.Ed.2d 318 (May 4, 1992) [right of habeas petitioner to present new evidence to federal habeas court regarding the validity of a guilty plea limited]. More recently, the Court has granted review regarding the extent to which the admissibility of a confession is open to examination under the habeas statute. Withrow v. Williams, cert. granted, 112 S.Ct. 1664, 118 L.Ed.2d 386, 51 Crim.L.Rep. 3021 (April 20, 1992; No. 91-1030); opinion below, 944 F.2d 284 (6th Cir. 1991).

The Eleventh Circuit has apparently concluded that collateral review of a conviction offered solely for sentencing on a subsequent offense is not constitutionally required. United States v. Williams, 954 F.2d 668 at 673 (11th Cir. 1992). Also see United States v. Hewitt, 942 F.2d 1270 at 1276 (8th Cir. 1991),

and United States v. Day, 949 F.2d 973 at 980 (8th Cir. 1991) [collateral attack on prior conviction offered for sentencing under U.S. Sentencing Guidelines no longer authorized]; United States v. Canales, 1992 U.S.App.Lexis 9591, 51 Crim.L.Rep. 1218 (5th Cir.) (May 7, 1992) [such review is now discretionary]; United States v. French, 51 Crim.L.Rep. 1241 (6th Cir.) (May 28, 1992) [same].

The fact that previous cases have assumed by consent of the parties that a particular issue was reviewable on collateral attack does not mean that such review is constitutionally required. See Duckworth v. Eagan, 492 U.S. 195 at 205-214 (1989) (O'Connor, J., concurring); Stone v. Powell, 428 U.S. at 480-482; Wainwright v. Sykes, 433 U.S. at 84-88. Indeed, the Jackson opinion itself does not indicate that the state court's determination after the new hearing would be subject to further federal habeas court review. "[I]f the state court, at an evidentiary hearing, redetermines the facts

and decides Jackson's confession was involuntary, there must be a new trial on guilt or innocence without the confession being admitted in evidence." [Emphasis added.]

Moreover, as the Commonwealth has previously argued (Brief for Petitioner, pp. 8-18), the mere fact a plea was made without a Boykin warning does not establish that the plea was involuntary. The Court has previously held that confessions made without a Miranda warning are not necessarily involuntary and are not devoid of probative value. See Michigan v. Harvey, 494 U.S. 344 at 350-352 (1990). Hence Boykin error should not automatically invalid a guilty plea as involuntary. (See Brief for Petitioner, pp. 12-18).

For the foregoing reasons, Jackson v. Denno does not require that Raley receive a second evidentiary hearing in state court.

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